Roosevelt Memorial Medical Center *and* American Federation of State, County and Municipal Employees, Montana State Council 9. Cases 27–CA–17564–1, 27–CA–17564-3, 27–CA–17564–4, and 27–CA–17701–1

October 26, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 16, 2002, Administrative Law Judge Thomas M. Patton issued the attached decision. The Respondent filed exceptions with a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

We agree with the judge's findings that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees regarding their intention to strike, and that it violated Section 8(a)(5) and (1) by unilaterally implementing its final contract proposals concerning grievance/arbitration procedures, strikes, dues checkoff, and term of the agreement. For the reasons explained below, however, we disagree with the judge's findings that the Respondent unlawfully solicited employees to decertify the Union, disparately enforced its no-solicitation rule, and unlawfully reduced the work hours of intended strikers after the Union cancelled an impending strike.

Background

The Respondent operates a nursing home, emergency room, hospital, and rural health clinic. It employs approximately 70 employees in all departments, including 29 in its nursing department. Audrey Stromberg is the facility's administrator. Two part-time directors of nursing (DONs), Clair Brown and Brenda Hunter, report directly to Stromberg.

The Union was certified as the collective-bargaining representative of full-time and regular part-time licensed practical nurses (LPNs) and certified nursing assistants (CNAs) in separate units in 2000. Because it is chronically understaffed, the facility regularly uses nonunit, per diem employees to cover shifts.

Bargaining for initial contracts began in August 2000. When no agreement was reached after more than 10 months of negotiations, the Union, on June 20, 2001,[1] notified the Respondent of its intent to strike on July 27. On June 26, the Respondent sent a letter to unit employees asking them to say whether they intended to participate in the strike and followed up by questioning some employees directly. On the basis of the answers she received, Stromberg contacted per diem employees and volunteers (both from elsewhere in the facility and from the community), made arrangements with an employment agency to supply temporary strike replacements, and drew up a work schedule covering the period of the anticipated strike.

On July 23, 4 days before the announced strike date, the Respondent received written notice from the Union of its decision to postpone the strike indefinitely while the parties met in the presence of a Federal mediator. Stromberg then revised the work schedule to include employees who previously had advised the Respondent they would participate in the strike. While some strike replacements were left on the revised schedule, six unit employees who planned to participate in the strike were assigned fewer hours than they customarily worked before the strike notice.

In late July, CNAs circulated and signed two decertification petitions. The first was legally defective and was withdrawn. The second petition was dismissed because of this unfair labor practice proceeding.

On July 27, after the breakdown of the parties' final negotiating session, the Respondent declared an impasse in negotiations and advised the Union of its intent to implement its final offers. The Respondent implemented its final proposals on October 16.

Discussion

1. Interrogation

The judge found, and we agree, that the Respondent violated Section 8(a)(1) by interrogating employees about their intention to participate in the strike because it failed to include assurances against reprisals either in its letter or in direct inquiries made to employees who failed to respond to the letter.

2. Unilateral implementation

We also agree with the judge that the Respondent violated Section 8(a)(5) by unilaterally implementing its final contract proposals for dues checkoff, a no-strike clause, a grievance procedure with nonbinding arbitration, and a 2-year term. As the judge found, because the no-strike provision involves the surrender of statutory rights, and dues checkoff is "contract-bound," those terms cannot be imposed on the Union without its consent. See, e.g., *McClatchy Newspapers,* 321 NLRB 1386, 1390 (1996), enfd. in relevant part 131 F.3d 1026

[1] All dates refer to 2001, unless otherwise indicated.

(D.C. Cir. 1997), citing, inter alia, *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198–199 (1991).

We adopt the judge's conclusion that the Respondent acted unlawfully by imposing the grievance/arbitration procedure, but we do so only for the following reasons. Arbitration, like dues checkoff, has long been held to be a contract-based procedure. Because arbitration typically requires parties to give up their economic weapons and submit to final and binding resolution of their disputes, parties cannot be compelled to arbitrate grievances absent their explicit consent. *Indiana & Michigan Electric Co.*, 284 NLRB 53, 55, 57–58 (1987), and cases cited. Although the provision imposed here does not provide for binding arbitration, it requires the Union to engage in the process of striking arbitrators' names from a list and to pay half of the cost of arbitration. Given these requirements, and especially the financial burden imposed on the Union, we agree with the judge that the arbitration provision could not lawfully be implemented unilaterally. And, inasmuch as the arbitration provision was an integral part of the grievance procedure, we find that the entire grievance/arbitration article could not be imposed without the Union's consent.[2]

With respect to the 2-year term, we find that it was unlawfully implemented because, in these circumstances, it was tantamount to a 2-year refusal to bargain. It is well settled that parties have a continuing obligation to bargain even though they have reached a lawful impasse. *Paul Mueller Co.,* 332 NLRB 312, 317 (2000). By imposing a 2-year term of agreement, the Respondent in effect attempted to place the other imposed conditions beyond the reach of collective bargaining for that period. This it could not do, consistent with its continuing obligation to bargain after reaching impasse.

3. Reduction in scheduled hours

When the Union notified the Respondent of its intention to strike and the Respondent learned which employees would participate in the strike, Stromberg drew up a "strike schedule." This schedule included per diem employees, volunteers from other departments and from the community, and employment agency-supplied temporary labor, all working as temporary strike replacements. When the Union notified the Respondent 4 days before the proposed strike that it would be postponed, the Respondent requested that the Union bargain over how to return the intended strikers to the schedule. The Union did not respond to the request, and Stromberg proceeded alone to revise the strike schedule to integrate the would-be strikers back into it. In doing so, Stromberg retained on the revised schedule some of the temporary and per diem employees she had lined up as striker replacements. She testified that, using the prestrike schedule, she listed the employees and then alternated between names at the top and bottom of the list in scheduling work hours. As a consequence, five CNAs and one LPN who had informed the Respondent of their intent to strike were not initially scheduled for their full 37.5-hour shifts. Four of the six, however, ultimately worked their full number of hours by filling in for individuals who called in sick or took leave, as Stromberg had surmised would occur when she was making out the poststrike schedule.

Stromberg testified that she kept employees from the temp agency on the schedule because the agency told her that the Respondent would have to pay for them even if they did not work.[3] She also kept two employees who transferred from housekeeping on the revised schedule because the impending strike necessitated accelerating their transfers. Stromberg further testified that she kept certain per diem employees on the schedule because they had made special arrangements to work during the period (e.g., one had given notice at another job), and she did not want to lose their good will. Finally, Stromberg said the opening of an Alzheimer's unit in the facility had an effect on how she prepared the schedule because some employees said they did not want to work in the unit and others said they would only work if scheduled for less than a full shift because of the constant-care stresses that Alzheimer's-unit work entailed.

The judge found that following the cancellation of the strike, the Respondent unlawfully reduced the hours of six unit employees who had expressed their intent to strike. Citing *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967); *International Paper Co.*, 319 NLRB 1253 (1995), enf. denied 115 F.3d 1045 (D.C. Cir. 1997); and *Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989), the judge reasoned that the Respondent's conduct was "inherently destructive" of employee rights because it penalized the would-be strikers for announcing that they would engage in union activity, thereby distinguishing among workers based on their participation in conduct protected by the Act. He also found that the Respondent's conduct was potentially disruptive of future orga-

[2] In its exceptions, the Respondent does not contend that the grievance procedure, as distinct from the arbitration provision, could be lawfully implemented after bargaining to impasse. It argues only that, like the other unlawfully imposed provisions, the grievance/arbitration provisions were beneficial to the Union and had been approved by the Union during bargaining (which argument the judge correctly rejected). Accordingly, we express no view as to whether the Respondent could have unilaterally implemented a separate grievance procedure without an arbitration component.

[3] The contract with the temp agency is not in evidence, but the Respondent acknowledged that it did not contain a provision to this effect.

nizing and concerted activity because employees would be less willing to support the Union in negotiations, including making a commitment to strike, if the Respondent were free to reduce their hours, even when the announced strike was called off before it commenced. He found that although the Respondent had a legal right to prior notice of the strike under Section 8(g) of the Act in order to ensure that it could meet patient care needs,[4] it did not have the right to replace employees simply because they planned to participate in a strike. Finally, the judge said that under the "inherently destructive" analysis, it was unnecessary to determine the Respondent's motive for reducing the employees' hours.

In *Great Dane*, the Supreme Court explained that the analysis of an employer's motive in 8(a)(3) cases turns on the effect of its conduct on employees' Section 7 rights:

> From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

Great Dane, 388 U.S. at 34.[5]

Following *Great Dane,* the Board and the courts have elaborated on the Supreme Court's "inherently destructive" analysis and have noted the Court's distinction between the effects of an employer's conduct on the *substance* and the *process* of collective bargaining, finding that inherently destructive conduct applies only to those actions that exhibit hostility to the *process* of collective bargaining. See *Boilermakers Local 88 v. NLRB,* 858 F.2d 756, 763 (D.C. Cir. 1988); *Esmark,* supra, 887 F.2d at 748; *International Paper*, supra, 319 NLRB at 1269. Inherently destructive conduct is that which has "'far reaching effects which could hinder future bargaining'; i.e., conduct that 'creat[es] visible and continuing obstacles to the future exercise of employee rights.'" *Esmark,* supra (quoting *Portland Willamette Co. v. NLRB*, 534 F.2d 1331, 1334 (9th Cir. 1976)); see also *Boilermakers*, supra at 763. Such cases, however, are "relatively rare." *Boilermakers,* id. at 762 (quoting *Loomis Courier Service v. NLRB,* 595 F.2d 491, 495 (9th Cir. 1979)). In contrast, when an employer's conduct is of temporary duration and does not attempt to prevent employees from bargaining collectively, it is not unlawful without proof of antiunion motivation. See *Esmark,* supra; *NLRB v. Brown*, 380 U.S. 278, 284 (1965); *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965).[6]

Applying these principles to this case, we find that the judge erred in characterizing the reduction in the scheduled hours of the intended strikers as "inherently destructive" of their Section 7 rights. To the contrary, the record establishes that the scheduled and actual reduction in employees' hours was at most "comparatively slight." Only six unit employees who intended to participate in the strike were scheduled for fewer hours than they normally worked, and for them, the reduction was small—ranging from 4.5 to 8 hours. Moreover, as noted above, four of the six employees actually worked their full 37.5-hour workweek because of other employees' absences, something that Stromberg surmised would occur in the normal course of events when she drew up the poststrike schedule. A fifth intended striker did not request to work more than she was scheduled during the first 3 days, and thereafter she became unavailable to work at all because of an injury. The remaining employee declined to work in the Alzheimer's unit where she could have increased her hours. It is evident, therefore, that the poststrike

[4] *New York State Nurses Assn.*, 334 NLRB 798 (2001).

[5] Thus, the fact that conduct may be "discriminatory" is not itself sufficient to prove that the conduct has an unlawful motive. Rather, the issue of motive is subject to the principles set forth above.

Even when conduct is found to fall within the "inherently destructive" criteria, the Board may, but is not compelled to, find an improper motive. As the Court explained:

> If the conduct in question falls within this "inherently destructive" category, the employer has the burden of explaining away, justifying or characterizing "his actions as something different than they appear on their face," and if he fails, "an unfair labor practice charge is made out." And even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy. *Great Dane,* 388 U.S. at 33.

[6] As *Great Dane* makes clear, even if the effect of the employer's conduct is comparatively slight, the employer still has the burden of showing that its conduct served a "substantial and legitimate business end." At that point, the burden shifts to the General Counsel to prove unlawful motive. As explained below, the Respondent met its burden, but the General Counsel did not.

schedule—which the Respondent prepared unilaterally because the Union failed to respond to the Respondent's request to bargain over it—did not significantly adversely affect the number of hours that the proposed strikers actually worked, and the effect of the schedule change was indeed slight. Moreover, the would-be strikers were returned to their regular schedules within a few weeks.[7] The Respondent's conduct, therefore, was temporary, and did not have "far-reaching effects" on future bargaining between the parties.

Our dissenting colleague acknowledges that only two would-be strikers actually lost hours of employment, and that they lost relatively few hours, but nevertheless maintains that the Respondent's conduct was inherently destructive. In doing so, she expands the "inherently destructive" analysis well beyond its appropriate confines. Indeed, we are hard pressed to understand the dissent's position that the severity (or lack thereof) of loss sustained by employees as a result of their employer's conduct should not be taken into account in determining whether that conduct was inherently destructive of the employees' Section 7 rights. See *International Paper*, supra, 319 NLRB at 1269 (stating that the severity of harm to employees' Section 7 rights includes "the severity of harm suffered by employees for exercising their rights"). The more severe the consequences reasonably perceived by employees to flow from their exercise of Section 7 rights, the more likely it is that the future exercise of those rights will be chilled. Conversely, minimal consequences that reasonably and naturally flow from events like those here are less likely to have a chilling effect.

The facts in this case show that two would-be strikers each suffered a loss of pay for 8 hours or less, and our dissenting colleague finds this minimal loss inherently destructive of employees' rights. Under this standard, virtually any impact on employees resulting from an employer's response to a strike or intended strike would be inherently destructive of Section 7 rights. Such a result, which fails to consider the severity of harm resulting from the Respondent's conduct, is not supported by *Great Dane* or its progeny.

In his analysis, the judge referred to four "guiding principles" articulated by the Board in *International Paper*, supra, 319 NLRB at 1269–1270, to determine whether an employer's conduct is inherently destructive of employees' rights: (1) the severity of harm to employees' Section 7 rights; (2) the temporal impact of the employer's conduct; (3) the employer's hostility to the process of collective bargaining; and (4) whether the conduct makes collective bargaining appear futile to employees. The judge noted that all four factors need not be shown to find conduct inherently destructive. Id. at 1270 fn. 37.

As to the first principle, the Board in *International Paper* stated that consideration must include "the severity of harm suffered by the employees for exercising their rights as well as the severity of the impact on the statutory right being exercised." Id. at 1269 (citation omitted). In this case, the judge, citing *Esmark*, supra, 887 F.2d at 748, found that the Respondent's conduct severely harmed employees' rights because the Respondent directly imposed penalties on employees for engaging in protected activity. As explained above, we find that the impact of Respondent's conduct on the would-be strikers was clearly not severe.[8] In addition, we do not find that the record supports a finding that the conduct "directly and unambiguously penalize[d] or deter[ed] protected activity." Id. (quoting *NLRB v. Haberman Construction Co.,* 641 F.2d 351, 359 (5th Cir. 1981) (en banc)). The record shows that six would-be strikers were removed from the original poststrike schedule, not because of antiunion animus but because their announced activity made them unavailable to work. Similarly, when the Union postponed the strike, the would-be strikers were reintegrated into the schedule, although they did not immediately return to their former schedules because of the Respondent's obligations to the temps and per diem employees hired to replace them. Within a few weeks, as soon as the Respondent's obligations to the replacements ended, the would-be strikers resumed their former schedules.[9] Therefore, because the Respondent's conduct does

[7] The strike schedule was not entered into evidence and no one testified how long the strike was projected to last. The poststrike schedule, however, runs from the week beginning Sunday, July 22 through the week beginning Sunday, August 19. Presumably, the strike schedule that was prepared would have encompassed the same period, i.e., 24 days at most.

[8] In *Esmark,* the employer sold two meat-packing plants to a subsidiary, reopened the plants 2 weeks later, and repudiated the collective-bargaining agreements in effect at the plants before the sale. The Seventh Circuit found that the employer's conduct was inherently destructive because it clearly signaled to employees that collective bargaining was futile. *Esmark's* conduct, which resulted in the employees' total loss of representation, is far more severe than the Respondent's conduct here, which resulted only in the temporary loss of a few work shifts.

[9] The dissent, citing *Laidlaw Corp.,* 171 NLRB 1366 (1970), enfd. 414 F.2d 99 (9th Cir. 1969), cert. denied 397 U.S. 920 (1970), and *Fleetwood Trailers*, 389 U.S. 375 (1967), states that the Board and the courts have consistently ruled that the failure to reinstate economic strikers who have not been permanently replaced is inherently destructive of employee rights. Even if this statement is correct, it has no application here. The Respondent did not fail to reinstate the would-be strikers. On the contrary, when the Union postponed the strike 4 days before it commenced, the Respondent requested bargaining regarding reinstatement of the strikers, returned the strikers to the schedule, albeit with reduced hours, and returned them to their former schedules as

not "bear its own indicia of intent,"[10] the General Counsel still bears the burden of making an affirmative showing of such intent.

The dissent asserts that the temporary replacements and unit employees who chose not to strike should have been subject to the same risk of schedule reductions as the would-be strikers. The Supreme Court and the Board, however, have rejected this position under analogous circumstances. In *TWA v. Flight Attendants Union,* 489 U.S. 426, 438 (1989), the Court held that the employer was not required to replace junior crossovers with more senior strikers after the strike ended because "[w]e see no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful." Relying on the Supreme Court's decision in *TWA*, the Board in *Encino-Tarzana Regional Medical Center*, 332 NLRB 914 (2000), held that an employer faced with a 1-day strike lawfully hired temporary replacements for a contractual 4-day minimum, and during the 3 days after the strike, the employer was not obligated to displace crossovers with more senior returning strikers under the employer's "call off" procedure. In this case, we agree that because the strike announcement required the Respondent to commit itself to replacement workers, the would-be strikers, not the replacements or nonstrikers, should absorb the temporary consequences of the decision to strike.[11]

As to the second principle, the judge found that, because of the Respondent's conduct, employees would be less willing to support the Union in negotiations, and thus the conduct created "visible and continuing obstacles to the future exercise of employee rights." As discussed above, we do not agree that a would-be striker's temporary loss of up to one shift would have such a dramatic result. Moreover, courts have reasoned that conduct is inherently destructive to future bargaining because it creates "cleavage" between bargaining unit members.[12] See, e.g., *International Paper*, supra, 115 F.3d at 1049–1050; *Boilermakers*, supra, 858 F.2d at 763. For example, the *Boilermakers* court referred to *NLRB v. Erie Resistor Corp.,* 373 U.S. 221 (1963), where the employer granted strike replacements and crossovers 20 years' superseniority, thereby creating two camps, those who stayed with the union and those who returned before the strike ended. Such conduct was inherently destructive because it would divide the bargaining unit long after the strike ended and would remind members of their separation every time an issue involving seniority arose. In contrast, the temporary nature of the Respondent's actions here, and the small impact on the affected employees, would not create the kind of cleavage among bargaining unit members that the Supreme Court found inherently destructive in *Erie Resistor*.

As to the third and fourth principles (whether the conduct demonstrated hostility to the process of collective bargaining and whether it had the effect of discouraging collective bargaining by making it appear futile to the employees), the judge acknowledged that they were at best only arguably relevant and were of tenuous applicability here. As a result, the judge stated that he did not rely on them for his analysis of this issue.

In sum, because of the temporary nature of the Respondent's schedule change and its relatively small impact on employees, we find that the Respondent's actions had a comparatively slight effect on employees' rights.

Having found that the effect of the reduction in scheduled hours was comparatively slight, we examine whether the Respondent demonstrated legitimate and substantial business justifications for its conduct. We find that it has done so. Specifically, Stromberg testified that when the strike was called off, she attempted to put all of the unit employees back on the schedule without excluding the agency-supplied temp employees, for whom the Respondent was already obligated to pay, or the per diem employees who had substantially rearranged their lives in order to be available to help the Respondent. The prospect of forfeiting funds for agency-supplied workers justifies the Respondent's desire to keep those employees on the poststrike schedule, at least for a limited period of time. In *Pacific Mutual Door Co.*, 278 NLRB 854 (1986), the Board held that a 30-day notice of cancellation provision in the contract between the employer and the entity that supplied it with temporary replacements during an economic strike justified the employer's delay in returning strikers to their jobs. Here, too, the Respondent's desire to avoid having to pay for

soon as its obligations to the temporary replacements and per diems were met.

[10] *Great Dane*, supra, 388 U.S. at 33 (citation omitted).

[11] The dissent's attempt to distinguish *TWA* and *Encino-Tarzana*, because those cases, unlike this one, involved actual strikes, is unpersuasive. The effect here was the same; the impending strike caused the Respondent to hire replacements for would-be strikers to meet its scheduling requirements. The Union's decision to call off the strike at the 11th hour did not diminish the disruption to the Respondent's work schedule. The underlying principle remains: the would-be strikers can be required to absorb the consequences of the disruption to the work schedule that their actions caused.

[12] As stated above, employer action that creates "cleavage" among bargaining unit employees is one of several indicia of inherently destructive conduct. Contrary to the dissent's assertion, we do not suggest that conduct is inherently destructive "only if" it creates such cleavage.

unused employee services is sufficient justification for minimally reducing the scheduled hours of a few would-be strikers. Similarly, we find that maintaining the goodwill of per diem employees, who had rearranged work schedules and who the Respondent was dependent on to cover future shifts, constitutes sufficient justification for minimally reducing the affected employees' hours.

We disagree with our dissenting colleague's contention that the Respondent's business justification was pretextual and unsupported by the evidence. Stromberg testified without contradiction that she was informed by the temp agency that the Respondent would have to pay for agency-supplied employees whether or not they worked. She also testified that she kept two employees on the revised schedule whose transfers from housekeeping were sped up because of the impending strike, and that she offered work to certain per diem employees who had made special arrangements to work during the period and whose good will she did not want to lose. Stromberg further testified to the factors she considered in preparing the revised schedule: she weighed the needs of the proposed strikers for work, the Respondent's commitments to temporary employees hired in response to the strike notice, and the Respondent's obligations to per diem workers and in-house transferees. Although our dissenting colleague concludes that the Respondent's reasons for its actions were contradictory, we find that the Respondent made reasonable efforts to balance its obligations to various workers who were temporarily competing for a limited number of available shifts.

Having found that the Respondent established a legitimate and substantial business justification within the meaning of *Great Dane*, we must determine whether the General Counsel has demonstrated an antiunion motive for the Respondent's actions. We find that the General Counsel has failed to do so. Significantly, the Respondent attempted to solicit the Union's input into putting would-be strikers back on the schedule before Stromberg created the poststrike schedule, but the Union never responded. With little time to spare when the Union failed to respond, Stromberg made a list of all of the unit employees and intended replacements and then scheduled them by alternating between the top and bottom of the list. Thus, the Respondent's attempt to confer with the Union and its attempt to be fair in working the would-be strikers back into the schedule after the strike was cancelled clearly demonstrate its lack of antiunion animus.

We disagree with our dissenting colleague's claim that the Respondent's effort to confer with the Union was an attempt to enlist the Union in potentially compromising employees' rights. We are aware of no evidence that would support this claim, and we see nothing sinister in Stromberg's attempt to deal with a difficult situation by, among other things, asking for any suggestions the Union might have.

Further, the Respondent's unfair labor practices do not provide a sufficient basis for finding antiunion animus. Although the Respondent violated Section 8(a)(1) when it attempted to ascertain who planned to participate in the strike, that conduct alone does not reveal an improper motive. The Respondent had a legal right in the interest of patient care to determine who was going to strike, and even though it unlawfully failed to inform the employees that there would be no reprisals against strikers, there is no evidence that it intended to abridge the employees' rights. The Respondent's unlawful unilateral implementation of the contract proposals discussed above is similarly devoid of unlawful motive. Indeed, most of those provisions had been tentatively approved by the Union during negotiations, but contingencies were not worked out.

For all the foregoing reasons, then, we find that the reduction of the would-be strikers' hours did not violate Section 8(a)(3).

4. Soliciting decertification petitions

The judge found that the Respondent violated Section 8(a)(1) by soliciting two petitions to decertify the Union in late July and early August. He based this finding on the testimony of CNA Arlinda Reger, which he reluctantly credited after drawing an adverse inference against the Respondent. For the reasons set forth below, we find that the judge erred by drawing the adverse inference and consequently by crediting Reger, and therefore we disagree with his finding of unlawful solicitation.

Regarding the first petition (Case 27–RD–1098), Reger testified that DONs Brown and Hunter called her into their office to sign the petition and then gave her the petition along with a list of employees likely to support it and requested that she circulate it. She said that Stromberg entered the office, but she could not recall at what point in the discussion with Brown and Hunter that occurred. Brown denied soliciting Reger to sign the petition or circulate it. Hunter did not testify, but Stromberg testified that she never walked in on a meeting at which Brown and Hunter were discussing the decertification petition with Reger.

With respect to the second petition (Case 27–RD–1101), Reger testified that Hunter and Brown summoned her to their office and asked her to sign it, telling her that the first petition had been defective. Brown denied soliciting signatures for the petition or even being at the facility at a time when both Hunter and Reger were present. Timesheets admitted into evidence establish that Brown

clocked out on the evening of August 3, some 53 minutes before Reger clocked in to begin the nightshift.

The judge found that the testimony about the petitions was in equipoise, but he drew an adverse inference from the Respondent's failure to call Hunter as a witness. He credited Reger despite what he referred to as "objective problems with her testimony," as well as her demeanor, and acknowledged that no violation could have been found in the absence of the adverse inference. Thus, the adverse inference effectively "tipped the scale" in favor of Reger's testimony.[13]

We find that the judge erred in drawing an adverse inference from the Respondent's failure to call Hunter to testify and in relying on the inference to resolve this issue. Normally, it is within an administrative law judge's discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably be assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when that witness is the party's agent and thus within its authority or control. It is usually fair to assume that the party failed to call such a witness because it believed that the witness would have testified adversely to the party.[14]

In the circumstances presented here, however, we find no basis for inferring that the Respondent feared that Hunter's testimony would have been adverse. We infer instead that the Respondent elected not to call Hunter because the other record evidence supporting Brown's testimony made Hunter's testimony unnecessary.

Concerning the first petition, the testimony of two of the Respondent's witnesses flatly contradicts that of Reger. Thus, Brown denied meeting with Reger and soliciting her to circulate the petition, and Stromberg denied walking in on any meeting at which Brown, Hunter, and Reger were present. Hunter's testimony, though potentially corroborative, would have added little to the mutually consistent testimony of Brown and Stromberg. Having already elicited testimony from two high-level managers, and with a medical facility to operate during the hearing, the Respondent understandably chose not to call yet another witness to testify on the same point. A party has no obligation to call every witness at its disposal to prove its case. *International Business Systems,* 258 NLRB 181, 192 (1981).

With respect to the second petition, Reger testified that she signed it on August 3, at the request of Brown and Hunter. Brown denied that she and Hunter solicited Reger to sign any petition. Although no other witness corroborated Brown's testimony, undisputed documentary evidence strongly supports it. As stated above, the timesheets reveal that Brown clocked out 53 minutes before Reger clocked in on that date. In light of this evidence, it is understandable that the Respondent elected not to call Hunter to provide still more corroboration.

We therefore find that the judge was not warranted in drawing an adverse inference from the Respondent's failure to call Hunter as a witness or in relying on that inference to credit Reger, whose credibility he clearly questioned. The judge found that, absent the adverse inference, the evidence concerning the alleged solicitation of Reger to sign the petitions is, "at most, in equipoise," and this violation could not be found. We agree, and we accordingly dismiss this complaint allegation. See, e.g., *Blue Flash Express*, 109 NLRB 591, 591–592 (1954) (where credibility factors are equal and the judge is not persuaded by the testimony of the General Counsel's witnesses that unlawful conduct took place, the General Counsel has failed to meet his burden of proof). See also *American, Inc.*, 342 NLRB 768, 768 (2004).

5. Disparate enforcement of no-solicitation rule

Having credited Reger's testimony that the Respondent solicited her to circulate a decertification petition and that she did so for an hour and a half, the judge found that the Respondent disparately enforced its rule prohibiting "solicit[ation] for any purpose during work or non-work time in patient areas." We have found that the evidence fails to establish that the Respondent solicited Reger to circulate the petition. Moreover, there is no evidence that the Respondent knew of or tolerated any employee's circulation of the petition in patient areas. Accordingly, we reverse the judge's finding that the Respondent disparately enforced its no-solicitation rule.

AMENDED CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees regarding their intention to strike in a June 26, 2001 letter and in conversations with employees.

2. The Respondent violated Section 8(a)(5) and (1) by unilaterally implementing articles of its final contract proposals for the CNA and LPN units relating to dues checkoff, strikes, grievance/arbitration procedure, and term of agreement.

3. The Respondent has not otherwise violated the Act.

[13] We find no merit to the Respondent's exception that the judge erred by noting that Reger was discharged soon after the unfair labor practice hearing. A posthearing unfair labor practice charge and a complaint allegation concerning Reger's discharge (Case 27–CA–18000) were brought to the judge's attention in a motion to consolidate prior to the issuance of his decision in this case. It is clear, however, that the judge simply noted that case for procedural purposes without making any findings with respect thereto.

[14] *Automated Business Machines,* 285 NLRB 1122, 1123 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Roosevelt Memorial Medical Center, Culbertson, Montana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees regarding their intention to strike.

(b) Unilaterally implementing proposals providing for dues checkoff, no strikes, grievance/arbitration procedures, and term of agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) At the Union's request, rescind the unlawfully implemented proposals providing for dues checkoff, no strikes, grievance/arbitration procedures, and term of agreement for the CNA and LPN units.

(b) Within 14 days after service by the Region, post at its Culbertson, Montana facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that while these proceedings are pending the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 26, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER LIEBMAN, dissenting in part.

When an announced strike was canceled, the Respondent revised the work schedule prepared in anticipation of the strike. It cut the customary hours of six employees who had said that they *would* strike—but it left intact the hours of unit employees who planned to work despite the strike, as well as the hours of temporary and per diem employees hired as strike replacements. Contrary to the majority's view, this step was inherently destructive of the right to strike: only prospective strikers lost work and pay. But even if the adverse effect on employee rights was only "comparatively slight," as the majority concludes, the Respondent's claimed business justifications for its actions were unsubstantiated and implausible. Only hostility toward the potential strikers can explain what the Respondent did here.[1]

Facts

The relevant facts are not in dispute. After being notified on June 20, 2001,[2] that the Union would strike on July 27, and after determining (through unlawful means), how many employees planned to participate, the Respondent contracted with an employment agency for the supply of temporary employees.[3] It also made arrangements with members of its board of directors, employees from other departments, per diem employees, and other members of the community to work as temporary strike replacements.

Thereafter, the Union notified the Respondent by letter dated July 20, and received on July 23, that the strike was postponed pending further negotiations, and that it would give the legally-mandated 10 days notice of any future strike.

Despite the cancellation of the strike and having at least 4 days to adjust the strike schedule that had been prepared, the Respondent failed to return six unit employees to their normal hours on the schedule. None of the unit employees who planned to work rather than strike was scheduled for reduced hours, and none of the temp or per diem employees who had been secured as replacements lost hours.[4]

[1] I agree with my colleagues in all other respects, including the findings that the Respondent violated the Act by coercively interrogating employees about their intent to strike and by unilaterally implementing its final contract proposals on grievance/arbitration, strikes, dues checkoff, and term of agreement.

[2] All dates refer to 2001, unless otherwise indicated.

[3] The number of employees who intended to participate in the strike was not disclosed in the record.

[4] The Respondent does not take issue with the General Counsel's assertion that only intended strikers were adversely affected on the post-strike schedule.

In addition to the named discriminatees, employee Charlotte Caldwell worked a reduced schedule following the cancelled strike. The

Discussion

1. The Respondent's actions were inherently destructive

In *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the Supreme Court articulated two controlling principles for determining whether conduct that facially discriminates against employees who exercise their Section 7 rights violates the Act:

> First, if it can be reasonably concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. [388 U.S. at 34.]

Applying these principles, the Board and the courts have repeatedly found that employers violated Section 8(a)(3) by discriminating against lawful strikers. In *Great Dane* itself, the Board and the Supreme Court reasoned that the employer's unjustified refusal to pay strikers accrued vacation benefits, while paying them to nonstrikers, was unlawful. The Board and courts have also consistently ruled that the failure to reinstate economic strikers who have not been permanently replaced is inherently destructive of employee rights. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (9th Cir. 1969), cert. denied 397 U.S. 920 (1970); *NLRB v. Fleetwood Trailers*, 389 U.S. 375, 380 (1967).

The Respondent's conduct in this case is inherently destructive as well. The only employees who were adversely affected were those who had indicated that they would participate in the strike. There is no showing that anyone else—per diem employees, employees hired through the temp agency, individuals who made adjustments in other employment in order to work for the Respondent, or the Respondent's employees who transferred from other parts of the facility—were similarly disadvantaged. In these circumstances, the poststrike schedule signaled to all nursing employees that even the potential exercise of Section 7 rights would cost them.[5]

The nursing employees never exercised their statutorily protected right to strike, opting instead to give the collective-bargaining process another chance. Had they actually struck, they could not have been denied their former positions at the end of the strike unless they had been permanently replaced. According to the majority, though, employees who intended to strike but did not are entitled to no such protection. Instead, the Respondent was free to reduce their hours of work and earnings—and theirs alone—in order to accommodate the interests of replacement employees.

As things turned out, only two would-be strikers actually lost hours of employment, and they lost relatively few hours. But those facts do not lessen the seriousness of the Respondent's offense, which was to notify all employees via the poststrike schedule that employees who contemplated striking effectively would be punished with reduced shifts. That schedule clearly shows that six of the intended strikers, not two, were scheduled to lose hours. The fact that four of them ultimately were lucky enough to work full schedules by covering for other employees does not change the nature of the Respondent's action. In any event, the severity of an unfair labor practice may be measured as much by the method used to accomplish it and its likelihood of chilling future protected activity as by the present economic harm.[6]

2. The Respondent has not demonstrated a legitimate and substantial business justification for its actions

In any event, the Respondent's asserted business justifications for its discriminatory treatment of the would-be strikers are unfounded and pretextual. Thus, even if, as the majority finds, the effect of the Respondent's actions

prestrike schedule shows that Caldwell was scheduled to work a regular 12-1/2-hour shift on July 28, but the poststrike schedule shows that she was scheduled to work only 8 hours that day. Although Caldwell is not among the named discriminatees, Stromberg's testimony suggests that she may have indicated an intention to strike. If, however, Caldwell did not intend to strike, it was within the Respondent's purview to explain her reduced hours and to argue the parity of the would-be strikers' treatment with hers. This the Respondent did not do.

[5] The majority asserts that for conduct to be inherently destructive of Sec. 7 rights, it must have "far reaching effects which could hinder future bargaining" and "creat[e] visible and continuing obstacles to the future exercise of employee rights." *Esmark, Inc. v. NLRB*, 887 F.2d 739, 748 (7th Cir. 1989) (citations omitted). Retaliating against employees by effectively docking them a half day to a full day of pay for announcing that they would strike in support of their union's bargaining demands would have precisely those effects. I reject the majority's suggestion that an employer's conduct is inherently destructive only if it creates a "cleavage" between bargaining unit members. The case on which the majority relies for this suggestion itself observes that "the Supreme Court has not held that differential treatment within the bargaining unit is a necessary ingredient of inherently destructive employer conduct." *International Paper Co. v. NLRB*, 115 F.3d 1045, 1051 (D.C. Cir. 1997).

[6] Contrary to the majority's characterization of my position, I do not consider the severity of the harm to the employees caused by the employer's conduct to be irrelevant in determining whether the employer's conduct was inherently destructive of the employees' Sec. 7 rights. Here I find that the financial harm caused by the Respondent's conduct was severe enough to chill employees' future protected activity.

on the employees' Section 7 rights was "comparatively slight," the violation is still established. *Great Dane*, supra, 388 U.S. at 34–35.[7]

The Respondent offers several explanations for its failure to restore the would-be strikers to their former schedules. None rings true.

First, the Respondent contends that it was compelled by circumstances to accommodate the needs of replacement employees. It cites the testimony of Facility Administrator Audrey Stromberg, who said that, had the Respondent not employed the two individuals referred by the temp agency, it still would have been compelled to pay for their services. This testimony is entirely unsubstantiated. The Respondent's contract with the temp agency is not in evidence, but the Respondent concedes that it contained no such provision. Stromberg testified that she was informed of this extra-contractual requirement by the temp agency, but did not testify that she agreed to it. No one from the temp agency testified. On this record, no binding requirement to pay for the temps' services can reasonably be found.[8]

The Respondent also cites Stromberg's contention that the Respondent had an obligation to two individuals who had left other jobs in order to work for it during the strike.[9] This testimony is also unsubstantiated.

In any event, the Respondent's argument begs the question: why didn't the Respondent recognize any comparable obligation to accommodate the rights of the would-be strikers? In other words, Stromberg's testimony may explain why the Respondent *hired* those four individuals after the strike was called off, but it does not explain why they were not exposed to a reduction in hours on the same basis as the would-be strikers. In short, the "obligations" to the temps and other newly hired employees, which the majority invokes repeatedly, simply did not exist.[10]

Second, the Respondent relies on Stromberg's testimony concerning the supposedly random method she used to prepare the poststrike schedule. Again, that testimony is unpersuasive. Stromberg testified that she listed the names of the per diem employees, temporary employees, and the unit employees, and then selected names for the various shifts, alternating between the names at the top and bottom of the list in an effort to achieve randomness. But, if the selection process was random, as Stromberg testified, why were the would-be strikers the only employees whose hours were reduced? The Respondent offers only the bewildering assertion that cutting the hours of some of the intended strikers was justified because it was experiencing a *shortage* of RNs, CNAs, and LPNs. The Respondent also offers no justification for the fact that none of the unit employees who indicated an intention to work through the strike suffered a reduction in scheduled hours of work.

Furthermore, the Respondent's claim that its scheduling approach was an attempt to be "fair to all employees" is contradictory. If this claim were true, then the scheduling approach would have exposed the temp and per diem employees to the same risk of lost hours as other employees. But this is something the Respondent argues it was constrained *not* to do. The Respondent could *either* favor the temps and per diem employees over the would-be strikers, *or* it could try to achieve fairness. It could not do both. The Respondent's attempts to justify the reduction in hours on these mutually inconsistent grounds undermine its proffered justifications. In cases where the employer proffers inconsistent or shifting rea-

[7] Accordingly, I need not reach the issue of whether other evidence establishes that the Respondent was unlawfully motivated. However, I reject the majority's suggestion that the Respondent's offer to bargain over the composition of the poststrike schedule is evidence of a lawful motive. As I have shown, the intended strikers had a legal right to continue in their employment as they had done before the strike was announced. The Union was under no legal obligation to negotiate with the Respondent about the placement of those employees on the schedule. The Respondent's attempt to enlist the Union in potentially compromising employees' rights under the Act is hardly evidence of a lawful motive.

[8] *Pacific Mutual Door Co.*, 278 NLRB 854 (1986), cited by the majority, is clearly distinguishable. There, the provision requiring 30 days' notice of cancellation was included in the contract between the employer and the labor supplier, the contract itself was in evidence, and a strike actually took place during which strikers were temporarily replaced.

[9] One individual quit her job at a local pool, and the other individual arranged a vacation from his other employer.

The Respondent also contends that it had to accommodate the temps' and per diem employees' needs in order to ensure a steady supply of temp staff in the future. This argument, too, has no support in the record.

[10] Citing *TWA v. Flight Attendants Union*, 489 U.S. 426 (1989), and *Encino-Tarzana Regional Medical Center*, 332 NLRB 914 (2000), the majority contends that the Respondent lawfully gave preference to nonstriking permanent employees. Those cases, which both involved actual strikes, are inapposite. In each case, the employer lawfully failed to displace nonstriking "crossover" employees with returning strikers when the strike ended. Crucial to each decision was the fact that the employers had hired other employees who were not subject to displacement at the end of the strike. Thus, *TWA* had hired permanent replacements, and the employer in *Encino-Tarzana* had hired temporary replacements and guaranteed them a minimum of 4 days' pay, of which 3 days were still owing at the end of the 1-day strike. *In those circumstances*, where there was not enough remaining work to give to both the returning strikers and the crossover employees, it was held that the crossovers need not be displaced in favor of the returning strikers. Those circumstances do not exist here. As shown, the Respondent did not hire permanent replacements and had no obligation to employ either temps or new employees. Consequently, it has failed to show that it could not have provided full employment to both the would-be strikers and the permanent employees who did not indicate that they would strike.

sons for conduct that harms employees who have exercised their Section 7 rights, the Board has found those reasons to be pretext designed to mask an unlawful motive. *Casino Ready-Mix, Inc.*, 335 NLRB 463, 465 (2001); *Naomi Knitting Plant,* 328 NLRB 1279, 1283 (1999); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997*); Hi-Tech Cable Corp.*, 318 NLRB 280, 281, 293 (1995); *Jennie-O Foods, Inc.*, 301 NLRB 305, 321 (1991).[11]

The random scheduling process was an obvious sham. Accordingly, the Respondent has failed to demonstrate a legitimate and substantial business justification for its actions against the would-be strikers.

3. Conclusion

Because the Respondent's scheduled reduction in the hours of work of the would-be strikers was inherently destructive of their Section 7 rights, and because, in any event, the Respondent has failed to provide a legitimate and substantial business justification for its scheduling, I would find that it violated Section 8(a)(3) and (1) of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your intent to strike without assuring you that no reprisals will be taken against you if you say that you will strike.

WE WILL NOT refuse to bargain in good faith with the Union as the representative of our CNA and LPN employees by implementing our contract proposals for dues checkoff, no strikes, grievance procedure, and term of agreement without the consent of the Union, and WE WILL, if the Union requests, rescind any of these proposals we have implemented.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

ROOSEVELT MEMORIAL MEDICAL CENTER

William J. Daly, Esq., for the General Counsel.
Laura Christoffersen, Esq., of Culbertson, Montana, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS M. PATTON, Administrative Law Judge. This matter was heard in Culbertson, Montana, on April 16 and 17, 2002, based upon charges filed by American Federation of County, State and Municipal employees, Montana State Council 9 (the Union). The initial charges were filed in Cases 27–CA–17564–1 and 27–CA–17564–3 on July 30, 2001, and served the following day.[1] An amended charge was filed and served in Case 27–CA–17564–3 on September 28. The charge in Case 27–CA–17564–4 was filed and served on August 9. The charge in Case 27–CA–17701–1 was filed on November 6 and served the following day. An initial complaint issued on September 28. The amended consolidated complaint that was the subject of the hearing issued on December 31. The complaint alleges violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by Roosevelt Memorial Medical Center (the Employer or Respondent). The Employer denies any violation of the Act. On the entire record, including my observation of the demeanor of the witnesses and after considering the briefs filed by the General Counsel and Respondent I make the following[2]

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times the Respondent, a corporation, with an office and place of business in Culbertson, Montana, has been engaged in the operation of a health care facility (the Hospital). The Respondent admits that it meets the Board's standards for asserting jurisdiction. The record establishes and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. The answer admits, the record establishes and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[11] Adding to the pretextual nature of the Respondent's defenses, in attempting to justify its failure to return intended striker Joanne Anderson to a full schedule, the Respondent relies on her unwillingness to work in the facility's Alzheimer's unit. As the judge found, that contention is a red herring: before the strike was called, the Respondent had accommodated Anderson's desire not to work in the Alzheimer's unit, and there were any number of CNAs on the day shift who were available to work there.

[1] All dates are 2001 unless otherwise indicated.

[2] In assessing credibility, testimony contrary to my findings has not been credited, based on a review of the entire record and consideration of the probabilities and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962).

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The operation of the Hospital includes a 44-bed nursing home, a 10-bed hospital, an emergency room, and a rural health clinic. Culbertson is a small town located in a sparsely populated area in northeast Montana.[3] There are about 70 employees who work in various departments, including nursing, environmental services (maintenance, laundry, and housekeeping), dietary, and administration. The nursing department is managed by two directors of nursing (DONs), Brenda Hunter and Clair Brown, who are supervised by the Hospital's administrator Audrey Stromberg, The nursing department is staffed by approximately three registered nurses (RN's), four licensed practical nurses (LPNs) and 22 certified nursing assistants (CNAs). The number of regularly scheduled employees is insufficient to staff the hospital. The employer regularly uses per diem employees who work on an as needed basis.

On January 12, 2000, the Union was certified as the exclusive collective-bargaining representative of the Respondent's CNAs (the CNA unit).[4] The Respondent admits and I find that at all times since January 12, 2000, the Union has been the exclusive collective-bargaining representative of the CNA unit.

On March 15, 2000, the Union was certified as the exclusive collective-bargaining representative of a unit of Respondent's RN's and LPN's.[5] On or about June 25, 2001, the Respondent and the Union agreed to exclude the RN employees from the unit of nurses, thereby creating a unit of LPNs (the LPN unit).[6] The Respondent admits and I find that at all times since March 15, 2000, the Union has been the exclusive collective-bargaining representative of the employees in the LPN unit.

Collective bargaining regarding the CNA and LPN units began in August 2000 and continued through July 27, 2001. No contract was reached regarding either of the units. The Union gave the Employer written notice of intent to strike dated June 20, 2001, stating that both units would go out on strike at 12:01 a.m. on July 27.

In late June following the strike notice the Employer met with a group of employees in the basement of the Hospital.[7] Brenda Hunter and Clair Brown were present. At that meeting some employees voiced support for going nonunion.

After receiving the strike notice, the Employer sent a letter to each unit employee inquiring whether the employee would strike and stating that the Employer's intention was to assign replacement employees to announced strikers' shifts beginning July 27. The Employer followed up the letter with individual inquiries to employees who did not respond to the letter.

Based upon employee responses to the letter and the individual inquiries, the Employer revised and issued the assigned work schedule of the LPNs and CNAs beginning July 27 by removing the employees who had indicated intent to strike. The Employer arranged for replacement employees.[8] The strike was later called off and the Employer issued a revised schedule returning the announced strikers to the schedule.

In a telephone conversation on July 20 additional negotiations were scheduled for July 27. The Union advised the Employer in writing that the strike was postponed and stated that if the additional negotiations were not successful, the Union would give the Employer 10-days notice before striking. The letter was received on July 23. The parties met and negotiated on July 27, but no agreement was reached. There have not been further negotiations and there has been no strike or other further strike notice. On July 27 and August 8 petitions to decertify the Union were filed. The Employer unilaterally implemented bargaining proposals for both units that made changes in terms of employment on October 16.

B. The Allegations

The complaint alleges that the Respondent violated Section 8(a)(1) by coercively interrogating employees regarding their intention to strike in the June 26 letter; by questioning employees who did not respond to the letter; by soliciting the decertification of the Union; and by disparately enforcing a no-solicitation rule by permitting soliciting for the decertification petitions on worktime.

It is further alleged that the Respondent violated Section 8(a)(1) and (3) by not scheduling some employees for their full shifts after the strike was canceled. The complaint alleges that the Employer violated Section 8(a)(1) and (5) of the Act by implementing provisions in its final contract proposal for each unit. The implemented provisions provide for dues-checkoff, a no-strike provision, a term of agreement provision, and a grievance procedure.

The complaint alleges that the grievance procedure provides that an employee will be added to the Respondent's board of directors; that the Respondent's board of directors will make the final decision on any grievance at the third step; and that a nonbinding arbitration panel will be convened at the forth step and that the board of directors will make the final decision on any grievance.

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[3] The year 2000 census indicates that Culbertson is located in Roosevelt County. The census shows the population of Culbertson to be 716 persons and the population of Roosevelt County is to be 10,620.

[4] The CNA unit description is:

> All full-time, part-time and on-call Certified Nursing Assistants employed by the Employer at its facility in Culbertson, Montana, excluding all confidential employees, contract employees, office and clerical employees, guards and supervisors as defined by the Act and all other employees.

[5] The description of the certified unit of nurses is:

> All full-time and regular part-time registered nurses and licensed practical nurses employed by the Employer at its facility in Culbertson, Montana, excluding confidential employees, guards and supervisors as defined in the Act and all other employees.

[6] The agreed upon LPN unit description is:

> All full-time and regular part-time licensed practical nurses employer by the Employer at its facility in Culbertson, Montana, excluding confidential employees, guards and supervisors as defined in the Act and all other employees.

[7] There is no contention that the Act was violated at the meeting.

[8] There is no contention that this revision of the schedule violated by the Act.

C. The Evidence

1. The letter to employees

On June 26, the employer delivered a letter to each of its LPNs and CNAs that included the following:[9]

> In order to be able to schedule replacement staff during the strike, you need to inform the DONs [directors of nursing], in writing, of your intent to strike or that you will continue to work after 12:01 a.m. on July 27, 2001. This notice of intent must be returned to the DONs no later than Monday, July 2, 2001. If they do not receive a response from you, they will proceed as if you have indicated that you will strike on July 27, 2001, and your shifts will [be] assigned to a replacement.

The letter did not provide the employees with any assurances that no reprisals would be taken against them as a result of their responses.

2. Questioning of employees

Beginning on July 2, Claire Brown spoke individually with several employees who had not responded to the June 26 letter. Brown testified that she told the employees she needed to ascertain whether they would be available for work during the strike, to insure that there would be an adequate staff to meet the patient care needs. According to Brown, five employees had forgotten to turn in their notice and those five thereafter submitted written notice that they would not participate in the announced strike.[10] Brown testified that other employees she spoke with stated that they would strike, while others declined to state whether they would join the strike.

Several employees described Brown asking them about whether they would strike on July 27. Mary Hauso testified that Brown asked if she intended to strike or not, to which Hauso replied that she had not responded to the letter and that she thought that showed her intentions. According to Hauso, Brown replied that she was sorry to hear that. Geraldine Pennell testified that Brown asked her if she intended to go on strike, explaining the Employer needed to know to prepare the work schedule. Pennell testified that she told Brown that she intended to strike. Barbara Dean testified that Brown asked her if she was going to go on strike, and she replied yes, but that nothing more was said. Joanne Anderson testified that Brown asked if she intended to strike, and she replied that she was, and there was no further discussion. Each of these employees testified that Brown spoke with them at the Hospital within about 2 weeks following the June 26 letter and that Brown did not include in her remarks any assurances that no reprisals would be taken against them regardless of the nature of their response.

The versions of the conversations described by the employees do not vary in any material respect from Brown's description. To the extent they vary, I credit the employees' accounts of the specific conversations they had with Brown, including their testimony that Brown offered no assurances that reprisals would not be taken against them regardless of the nature of their response.

3. Soliciting decertification

The complaint alleges that the Employer solicited decertification of the Union on or about July 27 and August 3. The evidence relating to these allegations will be summarized in detail because of the credibility issues presented.

CNA Twila Flagen filed a decertification petition in Case 27–RD–1098. On July 27 Flagen requested withdrawal of that petition.[11] The Regional Director approved the withdrawal on August 10. Flagen filed a second petition in Case 27–RD–1101 on August 6, which was limited to the CNA unit. Both petitions were on standard NLRB petition forms. At the request of the General Counsel I took judicial notice of Cases 27–RD–1098 and 27–RD–1101 and the petitions and the showings of interest were received as exhibits.

The showing of interest for the first petition consists of 12 undated signatures on the otherwise blank reverse side of the petition form. The signatures are arranged in a single row down the page. Flagen's signature is the last on the showing of interest. The second signature is that of CNA Arlinda Reger.

Reger testified that following the Employer's June 26 letter to employees, but on a date she did not recall, she was called to the shared office of Brown and Hunter. According to Reger, only Brown and Hunter were present initially. Reger testified that she was asked to sign a document that was described to her as being to get the union out. Reger testified that she signed the document. At the hearing she was shown the first petition and asked if she had seen the document before, and her attention was directed to the reverse side. She identified the showing of interest on the reverse side of the first RD petition as what she signed in the office. Reger testified, however, "I've just seen this part here the signatures." She was not questioned further regarding the decertification petition form printed on the reverse side. According to Reger, she was given a list of about 9-10 names and told by Brown and Hunter that these were people who might also sign. Reger testified that she was told to take the showing of interest around, to try to get 13 signatures, but to get as many signatures as possible and to then return the paper to Brown or Hunter. According to Reger, Administrator Audrey Stromberg came into the office at some point. Reger did not describe at what point in the discussion Stromberg entered the office or her involvement, if any, in the discussion. Stromberg testified that she never walked into a meeting where Brown and Hunter were talking to Reger about circulating a decertification petition.

Reger testified that she then left the office and spent about 1-1/2 hours soliciting other employees to sign the showing of interest and five or six other CNAs signed immediately below her signature. Reger stated that she then gave the document to RN Charmane Riddle, who said she needed it. Riddle did not testify. The evidence does not show that Riddle was unavailable. The only employee identified by Reger who refused to

[9] When documents and testimony are quoted in this decision, the quoted matter has generally not been edited and the term "sic" has not been used. Editing appears in brackets.

[10] Brown identified these five employees as Joyce Schizvald, Tom Saunders, Corey Pronto, Bonnie Mintz, and Elizabeth Casey. None of the five testified.

[11] That petition appears, on its face, to have been defective because it sought decertification regarding both the CNA unit and the LPN unit with a single petition.

sign was Ernest Cadenhead, a temporary employee working during the summer of 2001.

Ernest Cadenhead testified that he worked for the Employer in May through August 2001, and that he was to return to work on May 8, 2002. Cadenhead testified that around the end of July he was approached by Reger at work and asked "to sign a petition to decertify the Union" and that he told her that he was not a member of the Union, but that he would not sign a petition to decertify because he was only a temporary employee and did not feel it was any of his business. Cadenhead testified that later the same day he was also asked to "sign the decertification paper" by Charmane Riddle, "another" RN.[12] Cadenhead testified that he told Riddle the same thing that he had told Reger. Cadenhead did not identify either of the petitions or showings of interests. Cadenhead's testimony is credited. It was credibly offered, was not negated by other testimony and the evidence does not show it to be unreliable.

Twila Flagen has been a CNA at the Hospital since 1992. Flagen testified that the petition in Case 27–RD–1098 was prepared using a blank petition form from the Board's website. She stated that she had asked Hunter how the Union could be decertified and Hunter had told her about the Board's website. Flagen testified that she did not have access to the web, so she sought the assistance of a friend, Marilyn Olsen, who was also a member of the Hospital's board of directors. According to Flagen, Olsen downloaded the form and typed in the information. Olsen did not testify. There has been no contention that the involvement by Hunter and Olsen in the initial steps of securing and preparing the decertification petition was unlawful.

Flagen testified that she personally secured all the signatures for the showing of interest for the petition and that the petition was in her possession at all times. She specifically denied ever giving the petition to Reger, Brown, or Hunter to circulate. Flagen stated that one of the persons she asked to sign the showing of interest for the first petition was Ernest Cadenhead. Cadenhead was not asked whether he had such a conversation with Flagen.

The showing of interest for the second petition is a separate, single sheet of paper. At the top is typed

> As a CNA I wish to petition to decertify from the Union at RMMC.
> Name Date

Below the typed portion are nine signatures, each followed by a date. The first name is Twila Flagen and the date is August 2, 2001. Below Flagen's name are eight additional signatures and by each is a date. The second and third signatures are dated August 1, 2001, the forth is dated August 2, 2001, and the remaining signatures are dated August 3, 2001. Flagen testified that she was actually the third person to sign the document, but that she inserted her name at the top, ahead of the next two names, at the request of Riddle. Flagen testified that her involvement in the second petition was limited to signing the petition and the showing of interest at the request of Riddle. Reger was the sixth signer of the second showing of interest. Flagen and Reger are the only signers of the second showing of interest who testified. There is no contention and the evidence does not show that the other signers or Riddle were unavailable.

Reger initially testified that she could not recall where she was when she signed the second showing of interest, who else was present, whether she was in the directors of nursing office nor could she recall from whom she received the document. She then testified, in response to leading questions, that she was asked to sign the showing of interest by Brown and Hunter. Reger testified that Brown and Hunter told her, "That the first one didn't go through or something, and we needed to do it over again, or something like that."

Brown testified as follows regarding asking Reger to sign a decertification petition:

> Q. Did you ever pull her in to sign a Decertification Petition? A. No, I did not.
> Q. Did you ever pull her in to ask her to circulate a Decertification Petition?
> A. No, I did not. . . .
> Q. (By Ms. Christoffersen) Were you involved at any point in asking any employees at RMMC to circulate a Decertification Petition?
> A. No, I was not. . . .
> Q. And did you have any participation in any efforts to decertify?
> A. No.
> Q. Were either of the Decertification Petitions ever in your possession?
> A. No, they were not.
> Q. Were they ever in your office?
> A. Not to my knowledge.

Brown testified that on August 3, the date Reger signed the showing of interest for the second petition, Reger was not clocked in at any time when Brenda Hunter and Clair Brown were both present. The time records reflect the following:

	In	Out
Brenda Hunter	5:44 a.m.	6.52 p.m.
Clair Brown	7:41 a.m.	5:07 p.m.
Arlinda Reger	6:00 p.m.	6:29 a.m.

Thus, on August 3, the date Reger signed showing of interest for the second petition, Brown clocked out 53 minutes before Reger clocked in and Hunter clocked out 52 minutes after Reger clocked in. Thus, Hunter was on the clock during the shift when Reger testified she was asked to sign the second showing of interest, but Hunter was not called to testify.

Brown testified that she and Hunter were paid hourly, like Reger, and that she is never at the facility when she is not on the clock. Brown acknowledged, however, that there was no rule against being at the facility when an employee is not clocked in. Stromberg testified that as the administrator for the hospital she requires all the hourly employees to clockin and that she has never observed either Hunter or Brown being on the premises when they have not clockedin.

Brown, Flagen, and Stromberg testified in a calm, relaxed and confident manner, however, Brown's denials were sum-

[12] Inferentially, it appears that Cadenhead was an RN. There has been no contention that Riddle is a statutory supervisor or agent.

mary in nature and elicited by leading questions. Reger appeared to be very uncomfortable, nervous and reluctant to testify.

Reger did not demonstrate good recall of the events. Thus, regarding the first showing of interest, Reger acknowledged no recollection of the date, other than that it was after the June 26 letter to employees. She testified that she had no recall of seeing the NLRB petition printed on the back of the showing of interest. It seems unlikely that employees would have placed their signatures on the paper without any indication of a purpose and the NLRB petition form on the reverse side would likely have been the subject of comment. Reger's testimony that she had approached Cadenhead regarding the first decertification petition and thereafter gave the showing of interest to Riddle is consistent with Cadenhead's account that one day he was asked first by Reger and then by Riddle to sign a decertification petition.

Reger either could not or would not recount the details of her signing the second showing of interest and the purported involvement by Hunter and Brown until the testimony was elicited by leading questions. Her testimony that the typed statement regarding the purpose of the document was not present when she signed it seems improbable and inconsistent with the appearance of the document.

Reger's demeanor and performance as a witness does not strengthen her credibility, but it does not necessarily indicate that her testimony is false. As a current employee, she would be testifying against her self-interest and adversely to the Employer's interests. It is not unreasonable that she would be fearful. The record does not show that Reger had any bias against the Employer or favoring the Union. To the contrary, the tenor of her testimony was that she continued to oppose union representation at the time she testified.[13]

The conflicting testimony regarding the showings of interest for the decertification petitions appears to be more than differences in perception and recollection. Some of the testimony may well have been willingly and knowingly false. A number of witnesses whose testimony might help resolve the credibility issues were not called.

The only signers of the two showings of interest who were called to testify were Reger and Flagen. Riddle was not called to shed light on both Reger's solicitation of Cadenhead and involvement by her in second petition. The record does not show that any of these employees were unavailable. The failure of both the General Counsel and the Respondent to call these employees to testify has been considered in making my credibility resolutions. See *Queen of Valley Hospital*, 316 NLRB 721, 722 fn. 1 (1995).

The Employer did not call Hunter to deny Reger's testimony or to corroborate Brown and Flagen. When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972); *International Automated Machines*, 285 NLRB 1122, 1123 (1987); *Made 4 Film, Inc.,* 337 NLRB 1152 (2002). The adverse inference rule permits an adverse inference to be drawn; it does not, however, create a conclusive presumption against the party. *Rockingham Machine-Lunex v. NLRB*, 665 F.2d 303 (8th Cir. 1981), cert. denied 457 U.S. 1107 (1982). The fact that Hunter was not present gives rise to an inference that her testimony would have been unfavorable to the Employer. The absence of Hunter not only strengthens the probative force of the witnesses for the General Counsel, but is itself clothed with a certain probative force. *Pur O Sil, Inc.,* 211 NLRB 333, 337 (1974).

The adverse inference that Hunter, had she testified, would have adversely affected the Respondent's case is sufficient to outweigh the objective problems with Reger's testimony, as well as her demeanor. Accordingly, I credit Reger's testimony over that of Brown and Flagen regarding the showing of interest for both the July and the August decertification petition.[14]

4. Disparate enforcement of a no-solicitation rule

At all relevant times, Respondent has had a rule in its employee handbook prohibiting employee solicitation on worktime. The General Counsel does not contend the rule is itself unlawful. The rule provides:

> Employees may not solicit for any purpose during work or non-work time in patient areas, including patient rooms, treatment rooms, or resident lounges. Reasonable forms of solicitation are permitted during non-work time, such as before or after work or during meal or break periods and in non-patient care areas. Soliciting employees who are on non-work time may not solicit other employees who are on work time. Employees may not distribute literature for any purpose during work time or in work areas. The employee lunchroom is considered a non-work area under this policy.

Stromberg testified that all employees had been expected to comply with the rule. However, Stromberg testified that in March 2001, following the resolution of an earlier NLRB charge, the Employer ceased enforcing the rule, except when complaints were registered. However, Stromberg testified that in response to complaints of employees of solicitation by supporters of the Union she notified Union Agent Tracee Raymond in June that the employees should be aware of the no solicitation rule and that it would be enforced. The evidence shows that Reger solicited employees to sign the showing of interest

[13] Reger was fired shortly after the hearing, but the record does not establish that she was biased against the Employer when she testified. A complaint and notice of hearing alleging that her discharge violated Sec. 8(a)(4) of the Act was scheduled for hearing, but was remanded to the Regional Director for disposition prior to the opening of a hearing, based on Reger's refusal to cooperate in the litigation of that complaint.

[14] Absent the adverse inference I have drawn from the failure of the Employer to call Hunter, the evidence favoring the credibility of Reger is, at most, in equipoise with factors favoring the Employer's witnesses. This conclusion is based on an assessment of the demeanor of the witnesses and the inherent probabilities. Accordingly, absent the adverse inference, the involvement of the Employer in soliciting the decertification described by Reger could not be found to have occurred. *Tomatek, Inc.*, 333 NLRB 1350 (2001); *El Paso Natural Gas Co.*, 193 NLRB 333 (1971).

for the first decertification petition on worktime in July with the knowledge of the Employer.

5. Not scheduling some employees for their full shifts

In June the Employer issued a work schedule for the CNAs covering the period July 15–August 19 (the prestrike schedule). The LPNs were on a separate schedule not in evidence. After receiving the strike notice the Employer revised the LPN and CNA work schedules by removing, beginning July 27, the employees who had indicated an intent to strike and scheduled others to fill their shifts (the strike schedule). The strike schedule is not in evidence.

The Employer had prepared for a strike by arranging for increased use of nonstriking per diem employees, employees from other departments within the facility, new hires from the community and employees furnished by a temporary employee agency as replacements for strikers.

On Monday, July 23, the Employer received notice from the Union that the strike had been postponed while the parties engaged in added negotiations, which were scheduled to begin July 27. The union letter said that it would give the Employer 10-days' notice before striking. The Employer's attorney, Laura Christoffersen, called Union Agent Tracee Raymond on July 23 and asked to discuss the return of the strikers to the schedule. Raymond testified that she told the attorney she should call Union Agent Don Kinman. On July 24, the attorney sent a letter to Kinman, with a copy to Raymond, confirming that she had called Raymond and Kinman and offered to negotiate regarding the return of the announced strikers to the schedule, but that the Union had refused. There is no evidence that the Union responded to the letter and there is no testimony inconsistent with the representation in the letter that on July 23 the Employer offered and the Union declined to negotiate regarding the issue.

On July 25, after the strike was canceled, the Employer issued a CNA schedule covering the period July 22–August 19 that returned the announced strikers to the schedule (the poststrike schedule). A revised LPN schedule that is not in evidence was also issued.

The complaint alleges that the Employer "failed to schedule certain of its employees for their full shifts because said employees had indicated their intention to participate in an anticipated strike."[15] The Employer contends that the scheduling of employees after the strike was canceled was based on legitimate business considerations unrelated to protected activity.

The complaint does not identify the employees who were not scheduled for their full shifts. Five CNAs and one LPN credibly testified regarding their scheduling after the strike was called off. They were Mary Hauso, Dorothy Gonitzke, Geraldine Pennell, Barbara Dean, Tara Madsen, and Joanne Anderson. Each had informed the Employer that she would join the strike.

Mary Hauso is an LPN who has worked for the Employer since 1988 and was on the Union's negotiating committee. She testified that for years before July 27 she worked three 12-1/2-hour shifts per week, for a total of 37-1/2 hours. Absent evidence to the contrary, I find that on the prestrike schedule she was assigned to work 37-1/2 hours each week. On the poststrike schedule she was scheduled for only two 12-1/2-hour shifts about the second week of August. She later was scheduled for a third shift after she volunteered to replace another employee who took the day off. Thus, Hauso worked 37-1/2 hours that week.

Dorothy "Dot" Gonitzke has worked at the Hospital as a CNA for about 4 years. She normally worked three 12-1/2-hour shifts per week, for a total of 37-1/2 hours. The poststrike schedule assigned her only two 12-1/2-hour shifts during the week August 5–11. She had been assigned 37-1/2 hours that week on the prestrike schedule. After the schedule issued, Brown asked her to work a third shift during her short week, in place of another employee. Gonitzke thus worked 37-1/2 hours that week.

Geraldine Pennell has worked for the employer as a CNA for about 5 years. She normally worked three 12-1/2-hour shifts per week, for a total of 37-1/2 hours. The poststrike schedule assigned her only two 12-1/2-hour shifts and an 8-hour shift during the week of August 5–11. She had been assigned 37-1/2 hours that week on the prestrike schedule. After the poststrike schedule issued, Pennell was assigned a third 12-1/2-hour shift, in place of the 8-hour shift and she thus worked 37-1/2 hours that week."

Barbara "Barb" Dean has been a CNA at the Hospital for about 14 years. She normally worked three 12-1/2-hour shifts per week, for a total of 37-1/2 hours. The poststrike schedule assigned her only two 12-1/2-hour shifts and an 8-hour shift during the week July 29–August 4. She had been assigned 37-1/2 hours that week on the prestrike schedule. She worked the assigned shifts. She did not inquire about the availability of additional work during that week and was not offered additional work. Dean acknowledged that additional shifts could frequently be picked up because of employee illness or other reasons. The Employer contends that she was injured on August 2 and off for an extended period thereafter. That injury would not, however, have affected her ability to work on July 30, August 1, or August 2.

Tara Madsen has been a CNA at the Hospital since 1978. She normally worked three 12-1/2-hour shifts per week, for a total of 37-1/2 hours. The poststrike schedule assigned her only two 12-1/2-hour shifts and an 8-hour shift during the week July 29–August 4. She had been assigned 37-1/2 hours that week on the prestrike schedule. Another employee needed to be absent from a 12-1/2-hour shift because of a medical appointment and Madsen took that shift and Hunter found someone else to cover Madsen's 8-hour shift. Madsen testified that shifts are commonly traded.

Joanne Anderson has been a CNA at the Hospital since 1978 and was a member of the union negotiating committee. She normally worked three 12-1/2-hour shifts per week, for a total of 37-1/2 hours. The poststrike schedule assigned her only two 12-1/2-hour shifts and an 8-hour shift during the week July 29–August 4. She had been assigned 37-1/2 hours that week on the prestrike schedule. She worked the assigned shifts. The revised schedule for that week has the notation "NA" for July 29. She explained that the notation means that she was not available to

[15] The complaint does not allege that the scheduling of employees violated Sec. 8(a)(5) and on brief the General Counsel acknowledged that the Employer was privileged to act unilaterally regarding the rescheduling following the strike postponement.

work and that the notation is consistent with her having been called by supervision to ask her to work that day. Anderson testified that she had not received a call to work that day and that such a notation might appear if an attempt to reach her was unsuccessful. There appears to have been a scheduling problem on July 29. The revised schedule indicates that nine CNAs were called without any CNA being found to replace Corie. The schedule shows the notation "no answer" for four of the nine persons called. However, no witness testified to having placed the call to Anderson. Corie had been scheduled for the Alzheimer's unit and Anderson did not work in that unit. Thus, she would have not been available to fill Corie's missed shift. Considering the probabilities, as well as demeanor, I credit Anderson's testimony that she did not receive a call.

Stromberg prepared the July 25 poststrike schedule. She testified that she began by listing the employees and it was apparent to her that there were more employees than were needed. She stated that she worked from the top and the bottom of the list toward the middle, to achieve randomness, and assigned shifts to the employees. Prior to the strike notice the Hospital was understaffed 2-1/2 RN's, 1-1/2 LPNs, and about 2 CNAs and relied on per diem staffing. Stromberg acknowledged that some of the planned striker replacements on the strike schedule were also put on the poststrike schedule.

Stromberg testified that one of her objectives in preparing the poststrike schedule was "[K]eeping the people who had given up other jobs also on the schedule at that point because they had done that to work for us. You know we did have an obligation to them." She testified that two employees from other departments of the Hospital worked CNA shifts after the strike was scheduled. Stromberg testified that one LPN and one CNA furnished by the temporary staffing agency were left on the poststrike schedule. Stromberg explained that this was done because the temporary staffing agency had told her that the Hospital would be charged for the employees, even if they did not work.[16]

Stromberg testified that the July scheduling was affected by the preferences of several of the announced strikers to not work on the Alzheimer's unit that opened in late June or early July. Joanne Anderson had indicated a preference to not work in that unit. Barbara Dean, Tara Madsen and others had indicated that they only wanted to work in the Alzheimer's unit for less than a full shift. The shifts in the Alzheimer's unit were accordingly shorter, apparently because of the demanding nature of the work. The poststrike schedule discloses that a CNA was assigned to a 3-hour shift in the Alzheimer's unit from 7 a.m. to 10 a.m., followed by three shifts of 4 hours each, with coverage from 7 a.m. to 10 p.m. Thus, beginning July 27, the poststrike schedule shows that no LPN worked more than 4 hours in a day on the Alzheimer's unit.

The CNAs were assigned to either a 12-1/2-hour or an 8-hour shift on the days they were assigned to a shift on the Alzheimer's unit. The staffing levels permitted the Employer to accommodate Anderson's preference to not work on the Alzheimer's unit. The CNA poststrike schedule (GC Exh. 15) has the first names of three persons that do not appear on the prestrike schedule (R Exh. 3). They are Melinda, Shane, and Tara Q.[17] I conclude that they were striker replacements. Stromberg testified that Shane was Shane Garrett, a per diem employee who had worked for the Hospital in the past who had been hired to fill-in shifts through August 19. On the poststrike schedule Shane was assigned two 12-1/2-hour shifts the week July 29–August 4 and another two 12-1/2-hour shifts the week August 5–11. Shane may have been the CNA provided by the temporary staffing agency. The poststrike schedule assigned Tara Q. to two 12-1/2-hour shifts the week July 29–August 4. The poststrike schedule does not indicate that Melinda was assigned any shifts.

LaShell appears to have been a per diem employee. She had no shifts on the prestrike schedule July 29 through August 11, but on the poststrike schedule she was assigned three 12-1/2-hour day shifts the week of July 29 and three night shifts the week of August 5. Faith also appears to be a per diem. She had no shifts on the prestrike schedule for the week of August 5, but on the poststrike schedule she was assigned three night shifts that week.

Jessica was a new hire. Stromberg testified, "Jessica Schmitz was left on, and she had given up her job or part of her job with the swimming pool to finish up her summer employment at RMMC." She thus appears to have been hired as a striker replacement. Jessica had no assignments on the prestrike schedule, but had four 8-hour shifts assignment each week from July 29–August 11.

A revised poststrike schedule (R Exh. 4) adds the name of "Teri," a name also not on the prestrike schedule. Teri was assigned a 6–10 shift on August 11. The record does not disclose when Teri was added to the schedule.

The evidence shows that CNAs Gonitzke, Pennell, Dean, Madsen, and Anderson could have each been assigned their usual 37-1/2-hour work schedule on the initial poststrike schedule without incurring additional staff hours, if the number of hours assigned to striker replacements had been reduced. The shifts assigned to the replacements may not correspond in each instance with days the asserted discriminatees had open in their reduced workweeks, but that could clearly have been addressed by rearranging the other CNA assignments. Alternatively, the Employer could have reinstated the prestrike schedule and made any necessary adjustments for staffing the Alzheimer's unit in a manner that did not reduce the hours of the announced strikers. In this regard, the employees were only assigned to work 3–4 hours on the Alzheimer's unit beginning July 26. The Employer chose to accommodate Anderson's wish to not be assigned to that unit and was able to accommodate her without reducing her hours because of the number of CNAs on each shift.

[16] The written contract with the temporary employee agency did not specifically address the issue of remedy if the Hospital attempted to cancel. This is not dispositive of the question of whether the Employer would be obligated to pay for employees not used.

[17] The schedules do not use surnames. There is a "Tara" on the prestrike schedule and a "Tara M." and a "Tara Q." on the poststrike schedule. Based on the telephone numbers on the schedules, I conclude that the "Tara" on the prestrike schedule is Tara Madsen and the "Tara M." on the poststrike schedule.

The evidence shows that LPN Hauso could have been assigned her usual 37-1/2-hour work schedule when she was returned to the schedule following the strike cancellation by reducing the number of hours assigned to the LPN striker replacement from the temporary staffing agency who was left on the schedule.

6. Unilaterally implementing bargaining proposals

The Employer concedes that it unilaterally implemented its final contract proposals regarding the LPN and CNA units on October 16. The General Counsel concedes that at the time of implementation, the parties were at impasse and there is no contention that the Employer had bargained in bad faith prior to the implementation. The facts directly relating to the implementations are not in dispute. The implemented proposals contain provisions typically found in collective-bargaining agreements, including descriptions of the units, management rights, nondiscrimination, subcontracting rights, employee discipline, hours and conditions of work, assignment of employees, benefits and pay. The format, numbering and content of the articles of the implemented proposals at issue are the same.

The implemented provisions also provide for dues-checkoff, a no-strike provision, a term of agreement provision and a grievance procedure. The complaint specifically alleges that the grievance procedure provides that an employee will be added to the Respondent's board of directors; that the Respondent's board of directors will make the final decision on any grievance at the third step; and that a nonbinding arbitration panel will be convened at the forth step and that the board of directors will make the final decision on any grievance.

The implemented dues-checkoff provision, "Article 19 Union Security," provides that the Employer shall deduct and remit to the Union each month union dues and assessments from the pay of employees who have authorized the deductions in writing.

The implemented no-strike provision, "Article 15 Strikes," provides, in part:

> The Union and its members, as individuals or as a group, will not initiate, cause, permit, or participate in or join in any strike, work stoppage, or slowdown . . . during the term of this contract. . . . Disciplinary action, including discharge, may be taken by the Hospital against any employee or employees engaged in a violation of this article. The implemented term of agreement provision, "Article 20 Term," provides: This agreement shall be effective October 9, 2001 unless otherwise specified herein, and shall remain in full force and effect through October 9, 2003.

The implemented grievance procedure, "Article 14 Grievance Procedure," has four steps. Step 1 provides that the employee will initially present the grievance to the employee's immediate supervisor. Step 2 provides for submission of the grievance by the employee to the hospital administrator, if the grievance is not resolved at step 1. Step 3 provides that if the Union and the grievant disagree with the hospital administrator's decision, appeal may be taken to the Hospital's board of directors, who shall make a final decision. Step 4 provides that if any of the parties do not agree with the decision at step 3, any party may take the grievance to "non-binding, advisory arbitration before an arbitration board." The decision of the arbitration board is to be directed to the Board of Directors and may be accepted or rejected by the board of directors.

The implemented proposals provide that the arbitration board will be three persons; one bargaining unit employee, one member of the board of directors (but not a unit employee), and a member of the community. The community member is to be selected by a process involving the Union and the Employer.

The implemented grievance procedure provides for appointment of one bargaining unit employee to the Hospital's board of directors from "the entire bargaining unit" by election. It is not clear whether the intent was to have an employee for each unit or one employee from the combined CNAs and LPNs.

D. Analysis

1. The letter to employees and orally asking employees if they would strike

The allegations that the Employer's June 26 letter to employees asking if they would strike and Brown's followup oral inquiries a few days later will be discussed together. The General Counsel argues that the letter and the conversations were unlawful because they did not provide the employees with any assurances that no reprisals would be taken against them as a result of their responses.

The General Counsel points to the Board's decision in *Preterm, Inc.,* 240 NLRB 654, 655–656 (1979), where the Board held that a health care employer may properly ask if employees intend to participate in a strike after it has been served with a strike notice pursuant to Sec. 8(g) of the Act. However, the Board limited this right, finding that to lessen the inherently coercive effect of such polling, an employer must explain fully the purpose of the questioning, assure the employees that no reprisals will be taken against them as a result of their response, and otherwise refrain from creating a coercive atmosphere. The decision in *Preterm* was based on the considerations underlying the decisions in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), and *Strucknes Construction Co.,* 165 NLRB 1062 (1967). See also *Providence Hospital*, 285 NLRB 320 fn. 2 (1987). More recently an employer's use of a questionnaire inquiring into employees' intent to report to work on the first day of a proposed strike, whether the employees would continue the strike until it was resolved, and the anticipated length of the strike was found to violate the Act because it was not accompanied by simultaneous assurances against reprisal. *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040, 1049 (1994). The analysis in *Holyoke* explicitly relied on *Preterm* and *Johnnie's Poultry.* Thus, the judge in *Holyoke* quoted the Board's decision in *Preterm*:

> In order to lessen the inherently coercive effect of the polling of its employees, Respondent had an obligation to explain fully the purpose of the questioning, to assure the employees that no reprisals would be taken against them as a result of their response, and to refrain from otherwise creating coercive atmosphere.

The Employer argues that the decision in *Preterm* was based upon the application of a per se rule, an approach that the Board

abandoned in *Rossmore House*, 269 NLRB 1176 (1984). In *Rossmore House* the Board concluded that casual questioning of open and active union supporters concerning union sympathies was not a per se violation, The Board observed, "To fall within the ambit of § 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference." id. at 1177. The Employer points to the Board's decisions in *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985), and *Bo-Ed Inc.*, 281 NLRB 226 (1986).

In *Sunnyvale* the Board found that the judge properly applied the totality of circumstances test to alleged unlawful interrogation of an employee, even though she was not an open and active union adherent and that the judge correctly concluded that no violation of the Act occurred. In *Bo-Ed* the Board reached a similar conclusion. The Employer contends that *Holyoke* can be distinguished because the employer in *Holyoke* attempted to discover not only whether the employee intended to strike, but also how long the strike might last. That argument is unpersuasive. It is clear that the Board did not rely on the details of the inquiry regarding the length of the strike. See *Allegheny Ludlum Corp.,* 333 NLRB 734 (2001). Accordingly, I conclude that the Employer violated Section 8(a)(1) by sending the June 26 letter to employees asking if they would strike and Brown's follow-up oral inquiries to individual employees.

2. Soliciting decertification

The decision of whether or not to decertify a union belongs solely to the employees. The employer may provide general information about the process in response to employees' unsolicited inquiries, but an employer has no legitimate role in that activity, either to instigate or to facilitate it. *Lee Lumber & Building Material*, 306 NLRB 408 (1992). The complaint alleges that Brown and Hunter solicited employees to decertify the Union. As stated earlier, I have credited Reger's testimony regarding what occurred in Brown and Hunter's office on or about July 27 and on August 3 when she was asked to sign showings of interest to support decertification and on the first occasion to seek the signatures of other employees during her shift. I accordingly find that the Respondent thereby violated Section 8(a)(1) of the Act. See *Harding Glass Co.*, 316 NLRB 985, 991 (1995), enfd. in rel. part 80 F.3d 7 (1996).

3. Disparate enforcement of a no-solicitation rule

An employer violates Section 8(a)(1) of the Act by disparately enforcing a no-solicitation rule by according a decertification petition special treatment by permitting the solicitation of a decertification of a union on work time. *Albertson's, Inc.*, 323 NLRB 1, 6–8 (1997). The evidence shows that Reger solicited employee signatures for the showing of interest for the first decertification petition on work time with the knowledge and approval of the Employer, notwithstanding Stromberg's conceded determination that the Employer's no-solicitation rule would be strictly enforced and so advising the Union. Accordingly, the evidence shows that the Respondent thereby violated Section 8(a)(1) of the Act by disparately enforcing the rule.[18]

[18] The General Counsel does not urge a finding that permitting Reger to solicit during worktime was violative apart from the disparate enforcement of the rule.

4. Not scheduling some employees for their full shifts

The General Counsel first argues that the Employer was motivated by antiunion considerations in scheduling Mary Hauso, Dorothy "Dot" Gonitzke, Geraldine Pennell, Barbara "Barb" Dean, Tara Madsen, and Joanne Anderson because each had disclosed an intent to strike. The General Counsel contends that other unfair labor practices by the Employer are evidence of the Employer's unlawful motivation. The General Counsel argues further that the scheduling of the six employees for reduced hours was inherently destructive of employee rights and interests and, that it should be deemed proscribed by Section 8(a)(3) of the Act without need for proof of an underlying unlawful motive.

The Employer argues that the scheduling was based solely on legitimate business considerations. The Employer states that as a health care facility it had a right to make scheduling changes after receipt of a strike notice in order to insure continued patient care. The Employer contends that it had the right to consider legitimate business needs and issues of patient care in returning the employees to the schedule following the cancellation of the strike. In particular, the Employer claims that it was necessary to keep temporary replacement workers on the schedule to insure their availability in the future. The Employer further argues that it was privileged to keep the one CNA and one LPN provided by the temporary employee agency on the schedule because the agency had stated that the Hospital would be billed, even it the replacements did not work.

The Employer emphasizes that the employees who were returned to the schedule when the strike was canceled could reasonably be expected to fill out their schedule as adjustments were made because of openings that occurred later. The Employer asserts that while Dean was not offered additional hours work to make up the 4-1/2-hours she was short, she did not did not take the initiative to seek additional hours. Other than Dean, the only hours ultimately lost were 4-1/2 hours lost by Anderson.

The opening of the Alzheimer's unit is urged by the Employer as a legitimate consideration in preparing the poststrike schedule because several of the announced strikers, including Joanne Anderson, had expressed a preference to not work on the recently opened Alzheimer's unit and that others, including Barbara Dean and Tara Madsen, had indicated that they only wanted to work in the Alzheimer's unit for less than a full shift. The Employer also points to the problem of accommodating the training needs of newly hired employees, possibly a reference to the assignment of Tara Q to CNA shifts.

The arguments advanced by the Employer are not persuasive. The evidence establishes that the Employer's conduct was so inherently destructive of employee interests that it may be deemed proscribed by Section 8(a)(3) of the Act without need for proof of an underlying improper motive. *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967). Accordingly, I find it unnecessary to determine whether the Employer's other unfair labor practices establish an unlawful motive.

When deciding whether conduct is inherently destructive the Board applies four "guiding principles." *International Paper Co.*, 319 NLRB 1253, 1269–1270 (1995), enf. denied 115 F.3d 1045 (D.C. Cir. 1997). Employer conduct may be found inher-

ently destructive without exhibiting all four characteristics Id., fn. 37. The first guiding principle is that an employer's policy of directly attaching penalties to participation in protected union activities is inherently destructive of the employees' statutory right to engage in those activities. In the present case the Respondent has penalized employees because they had stated that they intended to participate in a strike by reducing their hours. Actions that distinguish among workers based on their participation concerted action such as a strike are inherently destructive. *Esmark, Inc. v. NLRB*, 887 F.2d 739, 748 (7th Cir. 1989).

A second consideration in determining whether conduct is inherently destructive is whether the conduct is potentially disruptive of the opportunity for future employee organization and concerted activity, rather than only influencing the outcome of a particular dispute. Such conduct creates visible and continuing obstacles to the future exercise of employee rights. In the present case there is a likelihood that employees will be less willing to support the Union in negotiations, including making a commitment to strike, if the Employer is free to reduce their hours, even if an announced strike is timely called off.

The remaining considerations in determining whether conduct is inherently destructive is whether the conduct demonstrated hostility to the process of collective bargaining and whether the conduct had the effect of discouraging collective bargaining by making it appear futile to the employees. While these considerations may be arguably relevant in the present case, their applicability is tenuous, in contrast with the considerations discussed above and they have accordingly not been relied on in reaching the conclusion that the reductions in hours was inherently destructive.

In reaching the conclusion that the scheduling of strike supporters was inherently destructive I have been guided by the purpose of the strike notice requirements in Section 8(g) of the Act. That provision recognizes that because of the needs of patients, health care institutions must have sufficient notice of any strike or picketing to allow for appropriate arrangements to be made for the continuance of patient care in the event of a work stoppage. *New York State Nurses Assn.*, 334 NLRB 798 (2001); *Greater New Orleans Artificial Kidney* Center, 240 NLRB 432 (1979); S. Res. 93–766, 93d Cong., 2d Sess. (1974). I have been referred to nothing in the reported decisions or legislative history that suggests that the statute grants health care employers the right to replace employees merely because they have voiced their intent to strike.

Accordingly, the conduct of scheduling employees for reduced hours after the strike was called off was inherently destructive. However, before concluding that the scheduling was unlawful it is necessary to weigh the interests of the employees in engaging in concerted activities against the Employer's claimed legitimate business justifications. *International Paper*, supra, 319 NLRB at 1267.

An objective of economic strikes and lockouts is to impose economic costs on the other party. The Employer's assertion that it should be permitted to give preference to strike replacements obtained from a temporary employment agency over employees who had announced their intention to participate in a protected strike because the Employer would otherwise possibly incur financial losses is inconsistent with the protected right of employees to strike. Similarly, favoring per diem employees and new employees to insure that the Employer will have a pool of strike replacements in the future is inconsistent with the employees' protected right to strike.

The Employer received sufficient notice of the strike cancellation to issue a schedule that included the employees who had planned to strike. The timing of the strike cancellation does not weigh against the interests of the employees.

The fact that some of the affected employees may have been able to secure additional hours after the poststrike schedule issued affects the backpay liability, but the unfair labor practice occurred when the poststrike schedule issued and a remedy is warranted with regard to all of the employees who were discriminated against.

The claimed problem of scheduling of employees for the Alzheimer's unit is a red herring. As discussed in detail earlier, the only unit person who objected to working 4 hours was Anderson. The Employer had chosen to accommodate her preference and the evidence does not establish that scheduling her was a problem. There were five or more CNAs on the day shift that would be available for the Alzheimer's unit.

The Employer had no legally cognizable justification for its inherently destructive conduct in scheduling employees who had indicated their intent to strike for less than their full shifts. Accordingly, the Employer violated Section 8(a)(1) and (3) of the Act by its scheduling of Mary Hauso, Dorothy Gonitzke, Geraldine Pennell, Barbara Dean, Tara Madsen, and Joanne Anderson during the period July 29–August 11, in the manner described in detail, supra.

5. Unilaterally implementing bargaining proposals

The complaint alleges that the Employer violated the Act by implementing the provisions in each proposal providing for dues-checkoff, a no-strike provision, a term of agreement provision and a grievance procedure. The complaint specifically alleges that the grievance procedure provides that an employee will be added to the Respondent's board of directors; that the Respondent's board of directors will make the final decision on any grievance at the third step; and that a nonbinding arbitration panel will be convened at the forth step.

The General Counsel acknowledges that following a good-faith impasse in negotiations, an employer is privileged to unilaterally implement changes in working conditions that are not substantially different or greater than what the employer proposed in negotiations. See *Atlas Tack Corp.*, 226 NLRB 222, 227 (1976), enfd. 559 F.2d 1201 (1st Cir. 1977). The General Counsel contends that implementation after impasse is not, however, applicable to every bargaining proposal. The General Counsel points to the decision in *McClatchy Newspapers*, 321 NLRB 1386, 1390 (1996), where the Board stated:

> [I]t is clear that application of implementation after impasse is not permissible regarding specified proposals. In particular, certain contract proposals, in addition to arbitration, constituting mandatory subjects of bargaining—even those that had been agreed to by the same parties in their expired agreements—e.g., union-security and dues-checkoff, and no-strike provisions are "contract bound" or involve a "statutorily guar-

anteed right" and could not appropriately be unilaterally thrust upon a party without its agreement to be bound. (Footnotes omitted).

The Employer acknowledges the Board's decision in *McClatchy* and the cases relied on by the Board, but contends that the facts of the present case are unique because, "The contract proposals which were implemented mirror the final proposals reached at the final bargaining session and in fact, either maintain the status quo or provide significant protections for the employees over the status quo which existed prior to implementation." The Employer cites no authority in support of this contention. I find, contrary to the contention of the Employer, that *McClatchy* is controlling.

In view of the foregoing, the evidence establishes that the Employer violates Section 8(a)(1) and (5) of the Act by unilaterally implementing articles 14, 15, 19, and 20 of its final contract proposals for the LPN and CNA units relating to grievance procedure, no-strike, provision, dues checkoff, and term of agreement.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The following described units are appropriate for collective-bargaining purposes:

(a) All full-time, part time and on-call Certified Nursing Assistants employed by the Employer at its facility in Culbertson, Montana, excluding all confidential employees, contract employees, office and clerical employees, guards and supervisors as defined by the Act and all other employees.

(b) All full-time and regular part time licensed practical nurses employed by the Employer at its facility in Culbertson, Montana, excluding confidential employees, guards and supervisors as defined in the Act and all other employees.

4. The Union, since January 12, 2000, has been and is, the exclusive representative of the employees in the CNA unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. The Union, since March 15, 2001, has been and is, the exclusive representative of the employees in the LPN unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.
6. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing articles 14, 15, 19, and 20 of its final contract proposal for the CNA unit relating to grievance procedure, no-strike provision, dues checkoff, and term of agreement.
7. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing articles 14, 15, 19, and 20 of its final contract proposal for the LPN unit relating to grievance procedure, no-strike provision, dues checkoff, and term of agreement.
8. The Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees regarding their intention to strike in a June 26, 2001 letter.
9. The Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees regarding their intention to strike in conversations with employees.
10. The Respondent violated Section 8(a)(1) of the Act by soliciting the decertification of the Union.
11. The Respondent violated Section 8(a)(1) of the Act by disparately enforcing a no-solicitation rule by permitting soliciting for the decertification petitions on worktime.
12. The Respondent violated Section 8(a)(1) and (3) of the Act by not scheduling employees Mary Hauso, Dorothy Gonitzke, Geraldine Pennell, Barbara Dean, Tara Madsen, and Joanne Anderson for their usual number of hours during the period July 29–August 11, 2001, because they engaged in protected union activities.
13. The Respondent has not otherwise violated the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminated against Mary Hauso, Dorothy Gonitzke, Geraldine Pennell, Barbara Dean, Tara Madsen, and Joanne Anderson, it must make them whole for any loss of earnings and other benefits, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

The Respondent shall be ordered to rescind one or more of articles 14, 15, 19, and 20 of its implemented final contract proposals for the LPN and CNA units, if requested by the Union.

[Recommended Order omitted from publication.]